Supreme Court of the United States

October Term, 1978
No. 77-1802

IN THE MATTER OF THE TRUST KNOWN AS
GREAT NORTHERN IRON ORE PROPERTIES

CHARLES S. ARMS and ELIZABETH P. ARMS,
Petitioners,

vs.

WILLIAM W. WATSON, LOUIS W. HILL, JR.,
HARRY L. HOLTZ, JOSEPH S. MICALLEF,
Trustees of the Great Northern Iron Ore Properties Trust
and
BURLINGTON NORTHERN INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

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June 15, 1978

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To the Supreme Court of Minnesota

Charles S. Arms and Elizabeth P. Arms petition this Court to issue its writ of certiorari to bring here for review the judgment of the Supreme Court of Minnesota in Cause No. 47571 on its docket.

OPINIONS

The opinion of the Supreme Court of Minnesota, by Mr. Justice Rogosheske, is reported in ___ Minn. ___, 263 N.W.2d 610 (reproduced in the Appendix hereto, printed under separate cover, Cert. App. 1) and the opinion of that Court upon its prior review of the case, by Mr. Justice Peterson, is reported in 308 Minn. 221, 243 N.W.2d 302 (reproduced in the Appendix, Cert. App. 32).

The opinion of the District Court, Second Judicial District of the State of Minnesota, sitting in St. Paul, by Judge Hyam Segell is not officially reported but is reproduced in the Appendix hereto (Cert. App. 22) as is the opinion of Judge Segell on the prior appeal. (Cert. App. 45.)

JURISDICTION

The judgment of the Supreme Court of Minnesota is dated and was entered March 27, 1978 (Cert. App. 31); the order denying rehearing was dated and entered March 27, 1978. (Cert. App. 22.)

This Court has jurisdiction to review under 28 U.S.C. 1257 (3) and 2101(c).

QUESTION PRESENTED

Whether the Commodities Clause of the Hepburn Act, 49 U.S.C. §1(8), bars transfer of the title to vast taconite properties on the Mesabi Iron Range to Burlington Northern Inc., a railroad engaged in hauling that ore to market.

STATUTE INVOLVED

The Commodities Clause of the Hepburn Act, enacted June 29, 1906, Ch. 3591, §1, 34 Stat. 584, codified as 49 U.S.C. §1(8), with the prohibitions thereof here important italicized, says:

> "It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, *mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect*, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."*

STATEMENT OF THE CASE

James J. Hill, the Empire Builder and driving wheel of the Great Northern Railway, acquired in the period 1897-1906 interests in 65,000 acres of iron ore lands on the Mesabi Range of Minnesota. Hill's Great Northern, merged in 1970 with Respondent Burlington Northern Inc., was the prime mover, as is now Burlington Northern, in hauling Mesabi ore to market. Cert. App. 33-34, 53-56, 66, 87; SR 378.

—Hill's Interest Was in the Freight

Hill explained to the Congressional Committee investigating his acquisition:

> "I bought that property so as to get control of transportation of that ore, which was important to that portion of the road, which had practically no business." SR 15.

*Emphasis supplied throughout.

He succeeded.

Hill's son, Louis W. Hill, in 1946 reported to the Board of Directors:

> "Great Northern Railroad has had *net* earnings of approximately $300,000,000 from the iron ore business, —or enough to provide all of the dividends the road has paid for the past 32 years." SR-166.

—Properties Temporarily Put in Hill-Owned Partnership

The properties initially, after Hill acquired them, were, until he could determine what to do with them, placed in Lake Superior Company, Limited, a Michigan partnership owned 75% by James J. Hill, 15% by his son James N. Hill and 10% by Robert I. Farrington, a close friend and business associate. Arms Ex. 11; Cert. App. 34, 57, 81; SR 79.

Lake Superior Company, however, had a limited life of only ten more years (SR 80) and under Michigan law would expire long before the ore could be mined. Various expedients, including the formation of a corporation to hold the title, were explored and for various reasons abandoned as either impractical or unlawful. SR 88, 461-465; Cert. App. 80-81.

Then a cloud appeared on the horizon.

—The Hepburn Act Problem

On June 29, 1906, Congress enacted the Commodities Clause of the Hepburn Act above quoted. That statute made it unlawful for a railroad to transport any commodity

> "mined *or* produced by it, *or* under its authority, *or* which it may own in whole *or* in part, *or* in which it may have *any* interest, direct *or* indirect * * *."

To be sure, this provision of the Hepburn Act was not to become effective until June 1, 1908, nearly two

years later. However, there it was on the statute books. It threatened a substantial portion of Great Northern's business.

A way around it had to be found.

The way was found.

(i) The Railroad Was Divorced From Any Possibility of Interest in the Ore Properties

The solution was to rid the railroad of any possibility of having any interest whatever in the ore lands, direct or indirect. Cert. App. 78, 88, 90.

This was accomplished through the medium of the Trust here in suit, the Great Northern Iron Ore Properties Trust. The properties were conveyed to the Trustees, and certificates of interest issued to those who were shareholders in Great Northern:

> "at the close of business on the Sixth day of December, 1906," Arms Ex. 81,

on the basis of one share in the trust for each of the 1,500,000 shares of Great Northern then outstanding. Cert. App. 34-35. This was Hill's Royal Gift to the then stockholders of Great Northern. The distribution was freely made without cost to the then stockholders and without any strings attached.*

Hill's theory was that:

> "If the stockholders of the railway company held the ores, or if they were held for them, the railway company would have a reasonable right to expect that the transportation of the ores on these lands would go over our railway." SR-98.

However, in order not to leave shipment of the ore

---

* It should be noted, however, that Great Northern reimbursed Hill for his personal investment. SR 15. The original certificate holders thus "bought" their certificates through reduction of their equity as shareholders in Great Northern.

"over our railway" wholly to loyalty, or to chance, leases granted to mine operators *required* that the ore be shipped via Great Northern. Cert. App. 90; SR 434-435.

Robert I. Farrington, Vice President and Comptroller of Great Northern, in April 1909 in the *Spokane Rate case*, explained that when the ore lands were leased, a condition was:

> "inserted in the lease that the ore, when mined, should be turned over to the Great Northern for transportation, *although a much higher rate of royalty could have been obtained had the lessee been left free to transport the ore over its own line of railway.*" SR 106.

The Trustees say they have not enforced these traffic clauses. However, they admit that leases outstanding today, and running into the 1990's, contain such tying clauses. T. 545-546. They also admit that the purpose was "To enable Great Northern Railway to retain iron ore traffic." Trustees' Answer to Burlington Northern Interrogatory 6. In the April 1, 1973, "Memorandum of Trustees on Order To Be Made," submitted to the trial court, the Trustees explained that "the purposes of the Trust were:

> (a) to avoid the prohibition of the Commodities Clause of the Hepburn Act * * *;
>
> (b) to retain the railway iron ore traffic for Great Northern Railway * * *," Trustees' Memorandum, April 1, 1973, Section II, pp. 1-2,

and that:

> "In view of the grantor's interest in retaining the traffic for Great Northern Railway * * * the Trustees *have properly assisted such allocation of the traffic* * * *.
>
> *These two objectives have been served up to this date.* The traffic has in fact been over the Great Northern Railway * * *." Trustees' Memorandum, April 1, 1973, Section IV, p. 4.

It is the opportunity for this kind of clubby arrangement, often hidden, difficult to prove, but here admitted, that the Hepburn Act was designed to forbid.

The 1,500,000 certificates of interest in the Trust are, and since 1910 have been, traded on the New York Stock Exchange and are now held by approximately 10,000 certificate holders scattered all over the country. Cert. App. 3, 34-35. Except that the trust certificates were initially issued to shareholders in Great Northern on a one-for-one basis, the certificates are in no way tied to the railroad shares. Both are independently owned and traded.

The Trust was to continue during the period of 18 lives in being plus 20 years thereafter. Two of the measuring lives still live. They are aged 76 and 92.

The Trust provided that:

> "17. Upon the expiration of the twenty (20) years next following the death of the last survivor of the before mentioned persons upon whose lives the said trust is limited, the trustees shall at once proceed to *wind up the affairs of said trust*. After paying or providing for all expenses or obligations of the trust they shall distribute ratably among the certificate holders all moneys remaining in their hands as such trustees, and shall convey and transfer unto the party of the first part [*i.e.*, Lake Superior Company, Limited, Hill's Michigan partnership], or its successors, or assigns, all property, save said moneys, held by them under said trust." Cert. App. 5.

(ii) Source of Burlington Northern's Claim

The limitation of "all property" remaining after the "wind up" of the Trust, it will be observed, was "unto the party of the first part," *i.e.* Lake Superior Company, Limited, Hill's Michigan partnership, "its successors, or assigns." That limitation created no Hepburn Act problem because Lake Superior Company, Limited, was not a

carrier and it was not owned by the railroad. However, on February 3, 1913, Lake Superior Company, Limited, nearing the end of its permissible life and about to go out of business quitclaimed to Great Northern Railway whatever interest, if any, it might have in the Trust in suit. SR 178; Cert. App. 35. This was the lawyer's way of folding up that partnership and leaving no loose ends.

It is on that quitclaim that Burlington Northern relies to seize these properties. Burlington Northern contends the properties must be conveyed to it, notwithstanding the Hepburn Act (which made it necessary for Great Northern to disclaim any interest in the properties) is still in effect, unchanged, and binding on Burlington Northern.

It was to *avoid* this result that the Trust was established.

(iii) But for Hepburn Act There Would Have Been No Trust

Frank Claybourne, counsel for the Trustees, explained to the trial court:

> "There was a Hepburn Act passed back in 1906 with a Commodities Clause in it preventing a railroad from hauling things like iron ore from its own mines or its own properties. *They wanted to divorce the railroad from hauling their own properties.*" T. 149.

Counsel continued:

> "This was done because the railroad couldn't own it and get the traffic. They wanted the railroad to get the traffic yet at the same time there was a need or desire that the people that were stockholders of the railroad be the beneficiaries of this. So that, right in the original trust instrument, the shares or certificates of beneficial interest that we are speaking about today were first distributed to shareholders of the Great Northern Railway." T. 150.

Francis D. Butler, senior counsel for the Trustees, similarly explained:

> "there is no doubt that *if it weren't for the Commodities Clause this Trust would not exist.* The Commodities Clause said that no railroad could carry any product of mines which it owned or product of plants which it owned over its lines." T. 167.

When Burlington Northern asked: "What are the purposes of the Trust?" the Trustees answered:

> "(a) To enable Great Northern Railway to avoid the consequences of the Commodities Clause [of the Hepburn Act].
>
> (b) To enable Great Northern Railway to retain iron ore traffic.
>
> (c) To manage the properties to yield as much profit as practicable in the same manner that the railway would have managed them had it retained them, and to distribute the cash proceeds and remaining assets to the beneficiaries of the Trust as provided in the Trust Agreement." Trustees' Answer to Burlington Northern Interrogatory 6.

James J. Hill understood that, because of the Hepburn Act, his railroad could not own the property or have *any* interest whatever therein. He testified in the Congressional inquiry into the matter:

> "THE CHAIRMAN. You do not claim that the Great Northern Railway Co., under the present interstate commerce act, could own and operate the Mahoning mine as a merchant mine?
>
> MR. HILL. I have just said it could not.
>
> MR. GARDNER. That is what I meant in asking whether it was a Federal law.
>
> THE CHAIRMAN. That *would be clearly within the commodities clause* of that act." SR 16-17.

The decision of the Minnesota Supreme Court requiring conveyance of the properties to the railroad in face of the Hepburn Act is made the more astonishing by prior decisions adjudicating that the railroad *cannot* lawfully own these properties.

Judge Donovan, in *Hill v. Reynolds* (D.C. Minn., 1948), 75 F. Supp. 408, held the Hepburn Act barred Great Northern from ownership of the ore properties. The court held the Trust:

> "was conceived by those in control of the Great Northern Railway Company for the purpose of divorcing holdings of natural resources from the Railway Company, so as to comply with the Hepburn Act passed by Congress in June, 1906, 49 U.S.C.A. § 1 et seq." 75 F. Supp. at 412.

On appeal in *Reynolds v. Hill* (8th Cir., 1950), 184 F.2d 294, the court, Judges Johnsen, Gardner and Thomas, ruled:

> "The setting and circumstances present the picture of large interrelated holdings of mineral lands, which had been amassed for the purpose of making additional earnings for the stockholders of the Great Northern Railway Company and of being the source of hauling revenues for the Railway itself. On such a control of natural resources by a carrier, Congress in 1906 laid its restraining hand, through the enactment of the Hepburn Act, 49 U.S.C.A. § 1(8), and the Great Northern Railway was *faced with the situation of having to divorce itself from connection with these holdings.*" 184 F.2d at 297-298.

True to the Hepburn Act, Great Northern insisted in earlier litigation that it could not lawfully hold the properties here in question. *Venner v. Great Northern Railway Company* (1912), 117 Minn. 447, 136 N.W. 271. Venner tried to compel dissolution of the Trust and sought transfer of the Trust properties to Great Northern. 117

Minn. at 452, 136 N.W. at 272-273. Great Northern *rejected the Trust properties.* It told the Minnesota Supreme Court that, if the properties were transferred to Great Northern, *it could not keep them.* It was Great Northern's position then that:

> "were said transactions [putting the ore properties in the Trust] to be set aside there would have to be returned to James J. Hill properties worth presumably anywhere from fifty to one hundred million dollars and for which Mr. Hill received only about four million dollars." (Great Northern's Reply Brief in the *Venner* case in the Minnesota Supreme Court, No. 17301, p. 15.)

Great Northern settled that case.

It could not risk acceptance of the properties. To do so would involve it in violation of the Hepburn Act.

Great Northern, therefore, considered it "advisable to enter into a settlement of this litigation * * *." B-N Ex. 48. Venner was paid $350,000, of which Great Northern paid two-thirds, and the Trustees one third. B-N Ex. 48; Lake Superior File A-1, pp. 27-37. It was worth that much to Great Northern to avoid the risk, if Venner were to prevail, of having these properties forced upon it.

Now the properties that, prior to this litigation, *two courts have held the railroad could not lawfully hold* and which the railroad assured a third court *it would have to give away if the properties were thrust upon it,* are ordered conveyed to the railroad. So it has come to pass that what was adjudged illegal is now judged legal.

How great the windfall to Burlington Northern may be judged from the fact that the Trust certificates, selling on the New York Stock Exchange at 34 on the morning of the decision by the Supreme Court of Minnesota, tumbled to 26½ on that same day before the Securities and Exchange Commission was able to stop trading in the

certificates, and are now 22⅜. The judgment of the market place was that the Minnesota Supreme Court transferred $17,457,500 of value from the certificate holders to Burlington Northern.

It is the size of this windfall, apparently, that emboldens Burlington Northern to put itself in the position of hazard it occupies by hauling Mesabi ore in which, as the Minnesota Supreme Court has just held, it has, at this very moment, an interest, not merely "indirect," but "*direct*"—in flagrant defiance of the Hepburn Act.

—The Prior Proceedings

The Trustees launched the present suit as one for instructions. They averred in their petition to the trial court:

> "Petitioners [i.e., the Trustees] *believe that they have the authority,* to the extent practical, *to convert all assets in their hands to cash* as termination of the Trust becomes imminent, *and to distribute the proceeds* of such conversion, together with any other cash on hand at the termination of the Trust *to the then holders of Certificates* of Beneficial Interest." Cert. App. 48.

The trial court held:

1. The Trust was established to give the natural red ore to the certificate holders. Upon the exhaustion of the natural red ore in August, 1973, the Trust had fulfilled the purposes for which it was established. The Trust accordingly should be terminated by conveyance of the properties to a corporation or other business entity under the trial court's supervision to give the 10,000 certificate holders ownership of the massive reserves of taconite, the mining of which the trial court found would continue for "one hundred years or more." Cert. App. 82, 89, 94. When the Trust was established, the taconite was thought to be worthless "country rock". It now has been made valuable as a source of iron by reason of improved technology, allowing recovery of iron from the taconite. Cert. App. 39, 68-78, 82, 93-94.
2. Burlington Northern could have no interest in the reversion because among other reasons the Hepburn Act made it unlawful for Burlington Northern to have any interest in the ore properties. Cert. App. 78, 90, 95.

The Supreme Court of Minnesota reversed. 308 Minn. 221, 243 N.W.2d 302, Cert. App. 32. It remanded the case to the trial court "to permit the instructions for which the Trustees petitioned," 243 N.W.2d at 304, Cert. App. 33, on the questions:

1. "the extent of the trustees' authority to convert trust assets into cash," and
2. "if they have such authority [to convert into cash], what their duties are with respect to the exercise of that authority." 243 N.W.2d at 308, Cert. App. 43.

The Minnesota Supreme Court, in that opinion, left both questions open for the District Court to decide as it should consider proper, untrammelled by anything in the court's opinion on those questions, for the court said:

> "We better fulfill our function as a reviewing court when we review issues after they have been decided below, rather than deciding them ourselves in the first instance." 243 N.W.2d at 308, Cert. App. 43.

Upon remand, the trial court answered both questions in the affirmative. It held the Trust:

> "was created to give the entire beneficial interest in the assets of the Trust to the Trust certificate holders. There were, after all, only two serious purposes in creating the trust:

(1) To exhaust the ore lands and distribute all of the proceeds thereof to the Trust certificate holders, thereby enabling the Great Northern Railway to enjoy the revenues from transporting the ores.

(2) To avoid the proscriptions of the Commodities Clause of the Hepburn Act." Cert. App. 24.

The Minnesota Supreme Court reversed. ___ Minn. ___, 263 N.W.2d 610, Cert. App. 1. It adjudged the reversion in Burlington Northern notwithstanding the Hepburn Act. It ruled:

"With regard to the Hepburn Act, we repeat our holding in the prior opinion in this case (308 Minn. 230, 243 N.W.2d 307):

"* * * Even if the carriage of the ore were held to be illegal, * * * it does not follow that this alone would render invalid what is an otherwise valid [reversionary] provision in this trust."

We extend our reasoning there to all of the other potential legal proscriptions against the railroad's owning mining lands invoked by the Arms. In fact, it is not clear that these legal proscriptions had any potential effect on the reversioner *until 1913; when the railroad first acquired the settlor's reversionary interest*. As stated in our prior opinion, '* * * [W]e are not prepared to say that this transfer 7 years [after creation of the trust] is controlling in ascertaining the intent of the grantor when this trust was drawn.' 308 Minn. 229, 243 N.W.2d 307. Although courts will not actively enforce illegal contracts, we do not have here a contract which was illegal at its inception but rather a validly created trust reversion. The trust properties must be allowed to pass under the trust instrument. The proper remedy for any claimed future illegality in Burlington Northern's acquisition of the trust lands would be an enforcement action under the Hepburn Act or Minn. St. 301.12 (ultra vires) at that future time. None of the

arguments advanced by the Arms exempts the trustees from their legal duties toward the trust reversioner according to the law of trusts and successive estates." 263 N.W.2d at 621, Cert. App. 17-18.

The Minnesota Supreme Court failed to recognize that the consequence of its adjudication that Burlington Northern *does* have an "interest" in the ore lands, is to adjudge Burlington Northern now—at this very moment —*is in violation of the Hepburn Act*.

Of course the proscriptions of the Hepburn Act had no effect on the reversion until 1913. *Until then the railroad had no interest in the properties*. It was to prevent the railroad from having any interest that the Trust was established. The proscriptions of the Hepburn Act, of course, did not make the Trust invalid in 1906. But the bar of the statute was there to take effect *whenever* the railroad might assert any interest in the mining properties, the produce of which it hauls to market.

The irony of this case is that the Hepburn Act which compelled James J. Hill to establish the Trust to insure that Great Northern would have no interest whatever, "direct *or* indirect," in the ore lands now, without change in the statute, allows Burlington Northern, the successor to Great Northern by merger, to succeed to those lands the ore from which it hauls to market. It frees also *all railroads everywhere* from the restraints of the Commodities Clause.

If the Hepburn Act is to be repealed, it ought not to be by the Supreme Court of Minnesota.

REASONS FOR GRANT OF THE WRIT

1. The Hepburn Act is made a dead letter by the decision of the Supreme Court of Minnesota. The decision runs counter to this Court's judgments in:

> *Delaware, Lackawanna and Western Railroad Company v. United States* (1913), 231 U.S. 363, where the Court in an opinion by Mr. Justice Lamar considered the Commodities Clause of the Hepburn Act applies "to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented," 231 U.S. at 370, and
>
> *United States v. Reading Company* (1920), 253 U.S. 26, where the Court in an opinion by Mr. Justice Clarke held the purpose of the commodities clause of the Hepburn Act was to end the injustice to the shipping public "which experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper." 253 U.S. at 61.

2. Seven Justices of this Court, including Justices Stone, Brandeis, Cardozo, Rutledge, Black, Douglas and Murphy, **have rejected the toothless construction the Minnesota Supreme Court has given the Hepburn Act.** These seven Justices made their views known in a pair of cases:

> *United States v. Elgin Joliet & Eastern Railway Co.* (1936), 298 U.S. 492,
>
> *United States v. South Buffalo Railway Co.* (1948), 333 U.S. 771,

both involving short belt line roads serving the steel industry, one in Chicago, the other in Buffalo.

Elgin, involved the Chicago Outer Belt Line, owned by United States Steel Corporation, with 195 miles of track serving the Chicago area; *South Buffalo,* involved a belt-line owned by Bethlehem Steel Corporation, serving the Bethlehem Steel Works in Buffalo, with 6 miles of main-line and 81 miles of spur track of which 58 miles were within the Bethlehem Steel plant. Both served to bring the products of industry to trunk-line carriers on their way to market.

In *Elgin,* 298 U.S. 492, Mr. Justice McReynolds, writing for the Court, held the Hepburn Act was not violated, whereas Justices Stone, Brandeis and Cardozo took the position the statute:

> "is concerned with transportation of commodities by a rail carrier where the carrier and the producer and shipper are so dominated by the same interest, through the exercise of power secured by stock ownership, as to make rebates, discriminations, attempts to monopolize and other abuses of carrier power, easy, and their detection and punishment difficult." 298 U.S. at 506.

In *South Buffalo,* 333 U.S. 771, Mr. Justice Jackson, writing for the Court, observed:

> "if the *Elgin* case were before us as a case of first impression, its doctrine might not now be approved." 333 U.S. at 774.

Justices Rutledge, Black, Douglas and Murphy considered that *Elgin:*

> "was decided in the teeth of the commodities clause, 49 U.S.C. § 1(8), that it should now be overruled, and that this conclusion is dictated by the legislative history which the Court misreads, in my opinion, as giving basis for the opposite one." 333 U.S. at 786.

The principle on which the *Elgin* and *South Buffalo* mini-line cases were decided manifestly cannot apply to a multi-state trunk line carrier such as Burlington Northern—or if it does, the Hepburn Act is meaningless.

The case calls for review by this Court. The Court has here the opportunity, and should seize it, to make clear that circumvention of the Hepburn Act protections against shipper-carrier conflicts of interest will not be tolerated.

CONCLUSION

The writ should issue:

1. To put aright the construction of an important federal statute;
2. To restore to the 10,000 certificate holders the values confiscate from them;
3. To tell Burlington Northern (as well as the other railroads waiting in the wings for the result in this case) that neither outright nor sophisticated maneuvers will serve to outwit the Hepburn Act.

If the Hepburn Act is enforced the certificate holders will not find the *res* has been passed to the railroad and that they have nothing left of their investment (which on the morning of the day the Minnesota Supreme Court decided this case the market valued at $51 million) but a

worthless certificate which recites it issued "for the ratable benefit of the shareholders of Great Northern Railway Company, appearing as such of record at the close of business on the Sixth day of December, 1906 * * *" Arms Ex. 81.

Respectfully submitted,

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